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IN THE

Supreme Court of the United States

October Term, 1957

No. 498

BROOKLYN EAGLE, INC.,

Petitioner,

vs.

M. MICHAEL POTOKER, as Secretary-Treasurer of Newspaper Guild of New York; Local 3, ANG, CIO,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK COURT OF APPEALS AND THE SUPREME COURT OF THE STATE OF NEW YORK, COUNTY OF NEW YORK

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M. MICHAEL POTOKER, as Secretary-Treasurer of Newspaper Guild of New York, Local 3, ANG, CIO,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK COURT OF APPEALS AND THE SUPREME COURT OF THE STATE OF NEW YORK, COUNTY OF NEW YORK

Petitioner prays that a writ of certiorari issue to review the order and judgment of the Court of Appeals of the State of New York entered in the above-entitled case and that said writ of certiorari issue to said Court of Appeals and to the Supreme Court of the State of New York, County of New York, which possesses the record herein.

Reports of Opinions Below

The opinion of the Supreme Court of the State of New York, County of New York, is reported in 141 N. Y. S. 2d 719 (not officially reported).

The opinion of the Appellate Division of the Supreme Court of the State of New York, First Judicial Department, is reported in 286 App. Div. 733, 146 N. Y. S. 2d 616.

The opinions and decisions of the Court of Appeals of the State of New York are reported in 2 N. Y. 2d 553, 141 N. E. 2d 841, and 3 N. Y. 2d —, — N. E. 2d —.

Jurisdiction of This Court

The order and judgment of the Court of Appeals of the State of New York, which affirmed the order of modification of the Appellate Division of the Supreme Court of the State of New York, First Judicial Department, was dated and entered in the Office of the Clerk of the Court of Appeals on April 4, 1957. The order making the order and judgment of the Court of Appeals the order of the Supreme Court of the State of New York, County of New York, was dated and entered in the Office of the Clerk of the Supreme Court of the State of New York, County of New York, on April 30, 1957. Petitioner moved before the Court of Appeals for reargument or, in the alternative, to amend the remittitur on May 15, 1957. The Court of Appeals denied the motion by order dated and entered July 3, 1957. This order was made the order of the Supreme Court of the State of New York, County of New York, by order dated and entered in the Office of the Clerk of the Supreme Court of the State of New York, County of New York, on August 6, 1957.

Jurisdiction is conferred upon this Court by Section 1257 of the U. S. Code, Title 28, authorizing certiorari to the highest court of a state where any title, right, privilege or immunity is specially set up or claimed under the Constitution or Statutes of the United States. The petitioner claims rights under the Labor Management Relations Act, 1947, Sections 141 *et seq.* of the U. S. Code, Title 29, and under Article I, Section 8, Clause 3, and Article VI, Section 2, of the Constitution.

Questions Presented for Review

(1) Under a collective bargaining agreement covering employees in an industry affecting commerce, do the courts of the State of New York have jurisdiction to enforce an arbitration provision or is jurisdiction exclusively in the district courts of the United States by virtue of Section 301 of the Labor Management Relations Act, 1947 (Section 185 of the U. S. Code, Title 29) and Article I, Section 8, Clause 3, and Article VI, Section 2, of the Constitution?

(2) Does a violation of an agreement not to strike in a collective bargaining contract covering employees in an industry affecting commerce result under federal law in such employees voluntarily severing their employment with the employer?

Statutes Involved

The constitutional provisions involved are Article I, Section 8, Clause 3, and Article VI, Section 2. They are set forth in Appendix A.

The statutes involved are those contained in Title 29, U. S. Code, Sections 141 *et seq.* and more particularly Title 29, U. S. Code, Section 185 (Section 301 of the Labor Management Relations Act, 1947), and Section 152, subd. 3 [Section 2(3) of the Labor Management Relations Act, 1947]. They are set forth in Appendix A.

Volume and page of the official edition appear in Appendix A.

Statement of the Case

On November 30, 1952, petitioner, the publisher of a newspaper known as THE BROOKLYN EAGLE (Rec. fols. 24, 57), entered into a collective bargaining agreement with the Newspaper Guild of New York, Local 3, ANG, CIO, the respondent herein, governing the terms and conditions

of its editorial and commercial department employees.* This agreement by express provision expired on November 29, 1954.

This agreement further provided in part (Section 27):

> "Not more than 90 days and not less than 60 days prior to the expiration of this agreement, either party may give to the other party notice of desire to change the terms thereof. In the event of such notice, negotiations shall be immediately entered into and proceed with all due diligence. If an agreement has not been reached by the date upon which this agreement expires, status quo conditions shall be maintained during negotiations unless and until such negotiations are terminated by either party."

On September 1, 1954, the Guild gave the Brooklyn Eagle notice in writing that it desired to modify the collective bargaining agreement between the parties "pursuant to the provisions of the Labor-Management Relations Act, 1947" (Rec. fols. 37-39). In accordance with this notice, meetings were held thereafter between the representatives of the respective parties.

No new agreement was reached between the parties by November 29, 1954, the expiration date of the agreement, and on that date it came to an end (Rec. fol. 63). Its terms, however, were to continue in effect during negotiations, as part of the *status quo* which both parties had agreed to maintain. For a time the terms of the contract and the *status quo* were continued while the parties were negotiating. But on January 28, 1955, the Guild abruptly terminated the *status quo* by calling a strike (Rec. fols. 26, 57, 64). It thereby *ipso facto* ended the effective period of the contract terms.

---

* The collective bargaining agreement Exhibit "A" annexed to the Guild's original petition in the Supreme Court of the State of New York is not printed, but by a stipulation approved by a Justice of that Court's Appellate Division (Rec. fols. 94-96) may be referred to by either party.

The Brooklyn Eagle continued to meet and negotiate with the Guild despite the strike (Rec. fols. 27, 57). On or about March 8, 1955, the Guild's negotiating committee refused to meet in joint session with the Brooklyn Eagle's negotiating committee (Rec. fol. 65). On March 16, 1955, the Brooklyn Eagle became finally convinced of the futility of further efforts toward a peaceful solution of its contract dispute with the Guild. On that date, therefore, it wrote the Guild summarizing the preceding events (including the Guild's terminating actions on January 28th and March 8th) and formally, for itself, putting an end to negotiations (Rec. fols. 40-44). The concluding sentence of its letter stated: "The consequences of the strike have destroyed the Brooklyn Eagle and we do not intend ever to resume publication of the newspaper." Thereafter, the Guild by an ultimatum in the form of a telegram demanded assurance of payment of severance, accrued vacation, unpaid overtime, holiday, notice of dismissal and sick leave pay "within 24 hours" (Rec. fols. 67-69).

On March 28, 1955, the Guild served a demand for arbitration upon the Brooklyn Eagle (Rec. fols. 46-51, 30). When the Brooklyn Eagle, through its attorneys, rejected the demand and stated its intention to apply to court for a stay of arbitration (Rec. fols. 52-54) the Guild instituted a proceeding in the Supreme Court of the State of New York, County of New York, for an order compelling arbitration.

Mr. Justice Hecht of the Supreme Court of the State of New York, County of New York, held that the strike by the Guild terminated the continued existence of the contract terms and that claims based on acts or omissions arising subsequent to termination of the contract are not arbitrable under the contract. The claims for severance and notice of dismissal pay were held not arbitrable while arbitration was directed for the claims for overtime, holi-

day and accrued vacation pay. The Appellate Division of the Supreme Court, First Judicial Department, reversed so much of the Supreme Court's order as had refused to direct arbitration on the claims of severance and notice of dismissal pay. The Court of Appeals of the State of New York affirmed the order of the Appellate Division of the Supreme Court and denied a motion for reargument or to amend the remittitur.

Federal Questions Raised

It is not disputed that in the instant situation the Guild is a "labor organization representing employees in an industry affecting commerce" and as such is subject to the provisions of the Labor Management Relations Act, 1947 (Rec. fols. 30, 37-38, 121-122).

The original petition for an order compelling arbitration refers to and annexes as Exhibit B a letter dated September 1, 1954, which notifies the Brooklyn Eagle "pursuant to the provisions of the Labor-Management Relations Act, 1947", of the Guild's "intention to modify" the collective bargaining agreement between the parties (Rec. fols. 25-26, 37-39).

The opinion of the Appellate Division of the State of New York, County of New York, refers to this (Rec. fols. 121-122):

> "On September 1, 1954, the Guild gave notice of its desire to modify the contract 'pursuant to the provisions of the Labor-Management Relations Act, 1947'" (Rec. fols. 121-122).

Paragraph 14 of the original petition for an order compelling arbitration sets forth the arbitration clause [Section 21(b) of the collective bargaining agreement between the parties] which states in part: "The parties agree to abide by the award subject to such rules and regulations

as any Federal agency having jurisdiction may impose" (Rec. fol. 30).

(1) The first question presented for review herein was raised in the Court of Appeals of the State of New York by motion for reargument or, in the alternative, to amend the remittitur. The motion and accompanying affidavit is set forth in Appendix C. Since this motion raised a question of jurisdiction over the subject-matter, it may, under New York State practice, be raised at any stage of the proceeding. As stated by the Court of Appeals of the State of New York in *Shea* v. *Export Steamship Corp.*, 253 N. Y. 17 at 21:

> "The question of jurisdiction over the subject-matter, when Congress imposes a prohibition against action in the State courts and makes the status of the defendant a jurisdictional fact, cannot be dispensed with by litigants. In such a case the court may at any stage of the action *ex mero motu* refuse to proceed further and dismiss the action when the lack of jurisdictional facts comes to its attention. (*Robinson* v. *Oceanic Steam Navigation Co., Ltd.*, 112 N. Y. 315.)"

After the submission of this motion to the Court of Appeals the Deputy Clerk of that Court wrote to counsel on both sides referring to the decisions of this Court in *Goodall-Sanford, Inc.* v. *United Textile Workers of America; General Electric Co.* v. *Local 205, United Electrical Workers; Textile Workers Union of America* v. *Lincoln Mills of Alabama* and stated:

> "• • •
>
> "In view of the fact that the papers on the motion for reargument of, or to amend the remittitur on, the above-entitled appeal refer to these cases the Court has requested us to write counsel, advising that they may comment on the effect of these recent decisions on the pending motion by letter within the next few days, if they so desire."

Both counsel responded to this letter by submitting written discussions of their respective positions on the effect of these decisions on the claim of preemption. The Court of Appeals thereafter denied the motion, and an order to that effect was entered by that Court (Appendix D).

It should be noted that the *Goodall-Sanford, Inc.*, case and other cases cited in the last previous paragraph of this petition, in which this Court for the first time held that Section 301(a) of the Labor Management Relations Act, 1947, gave jurisdiction to the Federal courts to enforce arbitration provisions in collective bargaining agreements, were not decided by this Court until June 3, 1957, after petitioner's motion for reargument in the Court of Appeals had been made but before it was decided.

(2) The second question presented for review herein is expressly mentioned in the opinion of the Court of Appeals. Petitioner contended in that Court that no valid claims for severance indemnity, notice of dismissal pay and vacation pay could arise under the contract between the parties as to employees who voluntarily severed their employment and that participation in a strike which violated that contract constituted such voluntary severance. The Court of Appeals rejected this contention in its opinion of April 4, 1957, in the following language:

> "Furthermore, it has long been the rule that striking employees do not lose their status as employees; this was so at common law (*Jeffery-De Witt Insulator Co.* v. *National Labor Relations Bd.*, 91 F. 2d 134, cert. denied 302 U. S. 731), a principle now embedded in our State statute (Labor Law, § 701, subd. 3; cf. *Degnan* v. *Metropolitan Life Ins. Co.*, 178 Misc. 312), *and Federal statutes regulating labor relations* (U. S. Code, tit. 29, § 152, subd. [3]; cf. *Labor Bd.* v. *Mackay Co.*, 304 U. S. 333)." (Italics ours.)

Reasons for Granting Writ

In the case of both questions raised herein the Court of Appeals of the State of New York has decided federal questions of substance which have not yet been determined by this Court.

1. This Court's recent decisions in *Textile Workers Union of America* v. *Lincoln Mills of Alabama* (1957), 353 U. S. 448, 77 S. Ct. 912; *General Electric Co.* v. *Local 205, United Electrical Workers* (1957), 353 U. S. 547, 77 S. Ct. 921, and *Goodall-Sanford, Inc.* v. *United Textile Workers of America* (1957), 353 U. S. 550, 77 S. Ct. 920, expressly hold that Section 301 of the Labor Management Relations Act, 1947, not only gives the federal district courts the power to decree specific performance of arbitration provisions in collective bargaining agreements covering employees in an industry affecting commerce, but requires federal courts to fashion and apply a body of federal substantive law in enforcing such agreements.

The opinion of this Court in *Textile Workers Union of America* v. *Lincoln Mills of Alabama, supra,* in holding that the statute not only creates a federal remedy but requires the creation and enforcement of a body of federal substantive law subject to "federal interpretation" impels to the conclusion that the uniform federal substantive rights thus created result in a federal preemption of the field. The opinion states in part (353 U. S. 456-457):

> "The question then is, what is the substantive law to be applied in suits under § 301(a)? *We conclude that the substantive law to apply in suits under § 301(a) is federal law, which the courts must fashion from the policy of our national labor laws.* See Mendelsohn, Enforceability of Arbitration Agreements Under Taft-Hartley Section 301, 66 Yale L. J. 167. The Labor Management Relations Act

> expressly furnishes some substantive law. It points out what the parties may or may not do in certain situations. Other problems will lie in the penumbra of express statutory mandates. Some will lack express statutory sanction but will be solved by looking at the policy of the legislation and fashioning a remedy that will effectuate that policy. The range of judicial inventiveness will be determined by the nature of the problem. See *Board of Commissioners* v. *United States*, 308 U. S. 343, 351. *Federal interpretation of the federal law will govern, not state law.* Cf. Jerome v. United States, 318 U. S. 101, 104. But state law, if compatible with the purpose of § 301, may be resorted to in order to find the rule that will best effectuate the federal policy. See *Board of Commissioners* v. *United States, supra*, at 351-352. *Any state law applied, however, will be absorbed as federal law and will not be an independent source of private rights.*" (Italics ours.)

Lower federal courts have expressly held that jurisdiction of the federal courts under Section 301 of the Labor Management Relations Act, 1947, is exclusive. Judge RYAN stated in *Fay* v. *American Cystoscope Makers, Inc., et al.* (S. D. N. Y., 1951), 98 F. Supp. 278, with respect to Section 301 of the Act (at p. 281):

> "However, in light of the determination that the section creates a new, federal, substantive right, * * * it seems clear that Congress preempted the field in this area.
>
> "The suggestion that plaintiff should be permitted to compel defendant to litigate a federal claim in a state court when Congress has explicitly made available a federal forum is indefensible."

This holding was cited with approval by the United States Court of Appeals for the Third Circuit in *Ass'n. of Employees* v. *Westinghouse Corp.*, 210 F. 2d 623, 629-630.

(1954), aff'd on other grounds 348 U. S. 437, 75 S. Ct. 489, the Court stating in a footnote:

"• • • •

"On the question whether Section 301 has made the federal courts the exclusive forum to determine cases involving collective bargaining contracts between employers and labor organizations representing employees in an industry affecting commerce, it is significant that in the tort section of the Labor Management Relations Act, Section 303, in the jurisdictional grant, Congress said that the party injured by the proscribed conduct 'may sue therefor in any district court of the United States • • • *or in any other court having jurisdiction of the parties* • • •' (Emphasis added.) § 303(b). There is no such choice of forums under Section 301, seemingly indicating that Congress intended to preempt to the federal courts litigation on collective bargaining contracts. • • •"

The fair implication of the decisions cited, and especially those of this Court, is, it seems to us, that the federal courts have exclusive jurisdiction over the enforcement of arbitration provisions in collective bargaining agreements affecting commerce. In any event, we submit that an authoritative pronouncement on this question by this Court is urgently called for. In every state, the question must sooner or later arise, whether the courts of that state may entertain proceedings to enforce arbitration provisions in such agreements, and if so, whether they may apply their own law to such proceedings, or whether the federal courts alone may act in the pronouncement and enforcement of a governing uniform federal law. This Court has already (*Guss* v. *Utah Labor Relations Board* [1957], 353 U. S. 1, 77 S. Ct. 598; *Amalgamated Meat Cutters & Butcher Workmen of North America, Local No. 427, AFL, et al.* v. *Fairlawn Meats, Inc.* [1957], 353 U. S. 20, 77 S. Ct. 604;

San Diego Building Trades Council v. *Garmon* [1957], 353 U. S. 26, 77 S. Ct. 607) settled the exclusivity of other portions of the same Act (Labor Management Relations Act, 1947). The question should, we submit, be answered with respect to this portion of the Act as well.

2. As to the question numbered (2) above (p. 3, *supra*) it is our contention that the decision of the Court of Appeals of the State of New York is contrary to controlling federal precedents. A substantial number of federal cases indicate that an employee in an industry "affecting commerce" who participates in a strike in violation of a contractual obligation not to strike severs his employment relationship (*National Labor Relations Board* v. *Columbian E. & S. Co.* [7th Cir. 1938], 96 F. 2d 948, 953, aff'd 306 U. S. 292, 59 S. Ct. 501, *National Labor Relations Board* v. *Deena Artware, Inc.* [6th Cir. 1952], 198 F. 2d 645, 651, cert. denied 345 U. S. 906, 73 S. Ct. 644, *National Labor Relations Board* v. *National Die Casting Co.* [7th Cir. 1953], 207 F. 2d 344, 348, *Boeing Airplane Co.* v. *National Labor Relations Board* [D. C. Cir. 1949], 174 F. 2d 988, 999; see also *National Labor Relations Board* v. *Sands Mfg. Co.* [1939], 306 U. S. 332, 59 S. Ct. 508; *Mastro Plastics Corp.* v. *National Labor Relations Board* [1956], 350 U. S. 270, 76 S. Ct. 349).

We submit that this question, also, ought to be authoritatively settled by this Court.

Wherefore, petitioner prays that this Court issue a writ of certiorari to the Court of Appeals of the State of New York and to the Supreme Court of the State of New York, County of New York, which is the Court which possesses the record herein directing a transcript of the record be

transmitted to this Court for a review of the decision and final order of the Court of Appeals of the State of New York.

Dated: September 16, 1957.

Respectfully submitted,

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APPENDIX A

(Constitution of the United States of America, Article I, Section 8, Clause 3; United States Code, page XLI)

Section 8. The Congress shall have Power

* * *

To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;

(Constitution of the United States of America, Article VI, Section 2; United States Code, page XLIII)

This Constitution, and the laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

(Title 29, U. S. Code, Section 185, page 4471; Section 301 of the Labor Management Relations Act, 1947; Ch. 120, Title III, § 301, 61 Stat. 156)

§ 185. *Suits by and against labor organizations*—(a) *Venue, amount, and citizenship.*

Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

(b) *Responsibility for acts of agent; entity for purposes of suit; enforcement of money judgments.*

Any labor organization which represents employees in an industry affecting commerce as defined in this chap-

ter and any employer whose activities affect commerce as defined in this chapter shall be bound by the acts of its agents. Any such labor organization may sue or be sued as an entity and in behalf of the employees whom it represents in the courts of the United States. Any money judgment against a labor organization in a district court of the United States shall be enforceable only against the organization as an entity and against its assets, and shall not be enforceable against any individual member or his assets.

(c) *Jurisdiction.*

For the purposes of actions and proceedings by or against labor organizations in the district courts of the United States, district courts shall be deemed to have jurisdiction of a labor organization (1) in the district in which such organization maintains its principal office, or (2) in any district in which its duly authorized officers or agents are engaged in representing or acting for employee members.

(d) *Service of process.*

The service of summons, subpoena, or other legal process of any court of the United States upon an officer or agent of a labor organization, in his capacity as such, shall constitute service upon the labor organization.

(e) *Determination of question of agency.*

For the purposes of this section, in determining whether any person is acting as an "agent" of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling.

(Title 29, U. S. Code, Section 152, Subdivision 3, page 4456; Section 2, Subdivision 3 of the Labor Management Relations Act, 1947; Ch. 372, § 2, 49 Stat. 450; Ch. 120, Title I, § 101, 61 Stat. 137)

§ 152. *Definitions.*

When used in this subchapter—

* * *

(3) The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless this subchapter explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to chapter 8 of Title 45 and sections 1291, 1292, 1293 and 1294 of Title 28, or by any other person who is not an employer as herein defined.

APPENDIX B-1

(Opinion of the Supreme Court of the State of New York, County of New York, 141 N. Y. S. 2d 719 [not officially reported])

HECHT, *J.*:

This is a motion by Local 3 of the Newspaper Guild of New York to compel The Brooklyn Eagle, Inc., to arbitrate petitioner's claims on behalf of its members, former employees of the respondent, to "severance pay, overtime pay, holiday pay, notice of dismissal pay and accrued vacation pay."

A collective bargaining agreement between petitioner and respondent expired November 29, 1954. It contained the following provision:

> "Not more than 90 days and not less than 60 days prior to the expiration of this agreement, either party may give to the other party notice of desire to change the terms thereof. In the event of such notice, negotiation shall be immediately entered into and proceed with all due diligence. If an agreement has not been reached by the date upon which this agreement expires, status quo conditions shall be maintained during negotiations unless and until such negotiations are terminated by either party."

On September 1, 1954, petitioner gave respondent notice of its desire to modify the terms of the existing agreement. Negotiations between the parties for a new agreement were unsuccessful and, on January 28, 1955, petitioner called a strike and its members ceased to perform services for respondent. The latter claims that the strike terminated the extension of the contract beyond its fixed expiration date. Negotiations between the parties continued

until, on March 8, 1955, petitioner's negotiating committee refused to meet in joint session with respondent's committee. On March 16, 1955, respondent wrote a letter to petitioner which stated: (1) that the strike on January 28 had terminated the "status quo" term referred to in § 27 of the collective bargaining agreement; (2) that the occurrence on March 8, 1955 constituted a termination of negotiations by petitioner; (3) that respondent accordingly also terminated negotiations; and (4) that "the consequences of the strike have destroyed The Brooklyn Eagle and we don't intend ever to resume publication of the newspaper."

This letter of March 16, 1955, in effect, dismissed the employees. If, as petitioner claims, the terms of the collective bargaining contract were in full force and effect up to the time of the letter, by virtue of the "status quo" provision previously referred to, petitioner is entitled to have the claim of severance pay submitted to arbitration, pursuant to the arbitration clause of the agreement.

On the other hand, if the "status quo" had ended at the time of the strike (or, in any event, on March 8), the claim of severance pay does not represent an arbitrable issue, for the right to severance pay under the contract depended upon a dismissal during the period the contract is in force. Although the expiration of an agreement containing an arbitration clause does not destroy the right to arbitrate claims which arose prior to the expiration date, based on acts or omissions accruing before the agreement came to an end, Application of Selly, 178 Misc. 1076, 37 N. Y. S. 2d 398, affirmed 265 App. Div. 846, 38 N. Y. S. 2d 362; In re Commercial Telegraphers Union, Sup., 123 N. Y. S. 2d 259, the arbitration clause may not be availed of as to claims based upon acts or omissions taking place subsequent to the expiration of the agreement, Lane v. Endicott Johnson Corp., 274 App. Div. 833, 80 N. Y. S. 2d 639,

affirmed 299 N. Y. 725, 87 N. E. 2d 450; Matter of Eisen, 191 Misc. 662, 77 N. Y. S. 2d 676.

The arbitrability of the claim for "notice of dismissal pay" also depends on whether the "status quo" was terminated prior to March 16, 1955.

Petitioner contends that the negotiations were not terminated until March 16 and that, therefore, the contractual "status quo" continued until that time. Although the contract does provide for continuation of the "status quo * * * unless and until * * * negotiations (for a new contract) are terminated by either party," it seems obvious that this provision contemplated that the employees would meanwhile continue to perform the extended contract and that the contract, as extended for the period of negotiations, would continue to bind the employees and not merely the employer.

Even where arbitration of a dispute between employees and employer is pending, the employees expressly agree "that there shall be no suspension of work." (§ 21 of contract). The commencement of the strike clearly constituted a repudiation by the employees of the continued existence of the contract. The strike was utterly inconsistent with the continued maintenance of the contractual "status quo" and effectively terminated the "status quo". A "status quo" *binding only on the employer* was manifestly not what was intended by the contractual provision for continuation of the "status quo" pending negotiations. Negotiations which respondent had with petitioner in an endeavor to end the strike did not have the effect of continuing a "status quo" which no longer existed in fact or in law. Only if the employees had continued to perform services after the expiration date of the contract would the contract term have been extended until one of the parties terminated negotiations or a new contract signed. To construe otherwise the provision for the maintenance of the "status quo" during negotiations, would lead to the absurd result that at the

end of the expiration date of the contract the employees could strike and thus fail to perform their obligations under the contract and yet keep the contract provisions alive by continuing to negotiate with the employer until the latter had no alternative but to terminate the negotiations. That could not reasonably have been the intent of the provision referred to.

In view of the court's conclusion that the contractual "status quo" terminated on January 28, 1955, it is unnecessary to determine whether, in any event, the "status quo" terminated on March 8, 1955, which was also prior to dismissal of the employees.

The court accordingly holds that the issues of severance pay and notice of dismissal are not arbitrable.

The claims to overtime pay, holiday pay, and accrued vacation pay must, however, be submitted to arbitration *to the extent that they are based on services rendered prior to the termination of the "status quo"*.

Overtime and holiday work prior to January 28 is compensable under the contract. It is for the arbitrator to determine the merits of the claims for pay for such work and for vacation pay. The contentions that the procedure prescribed by section 21 has not been followed and that, therefore, the application to compel arbitration of these claims is premature, is overruled. It is claimed that a "reasonable effort to settle" the existing differences would be futile, not to mention the fact that the respondent has permanently shut down its business.

The motion is granted to the extent of directing arbitration to proceed as to claims for overtime, holiday and vacation pay, and otherwise denied. Settle order.

APPENDIX B-2

(Opinion of the Appellate Division of the Supreme Court of the State of New York, First Judicial Department, 286 App. Div. 733, 146 N. Y. S. 2d 616)

SUPREME COURT

APPELLATE DIVISION—FIRST DEPARTMENT.

October, 1955.

DAVID W. PECK, *P. J.*,
EARLE C. BASTOW,
BERNARD BOTEIN,
JOSEPH A. COX,
FRANCIS BERGAN, *JJ.*

In the Matter

of

M. MICHAEL POTOKER, as Secretary-Treasurer of NEWSPAPER GUILD OF NEW YORK, LOCAL 3, ANG, CIO,
Petitioner-Appellant-Respondent,

and

BROOKLYN EAGLE, INC.,
Respondent-Cross-Appellant.

Appeals from order of Supreme Court at Special Term (Hecht, Jr., J.) entered May 26, 1955, in the New York County Clerk's office. Petitioner appeals in so far as the order denies motion to compel arbitration of claims for severance pay and notice of dismissal pay. Respondent ap-

peals from so much of the order as grants motion to compel arbitration of claims for vacation pay, overtime pay and holiday pay.

HERMAN E. COOPER of counsel (H. HOWARD OSTRIN, LIPPMAN BODOFF and EUGENE N. SOSNOFF with him on the brief; COOPER, OSTRIN & DE VARCO, attorneys) for petitioner-appellant-respondent.

DAVID L. BENETAR of counsel (OSCAR A. LEWIS, H. H. NORDLINGER, ROBERT C. ISAACS, JULIUS L. RASSNER and A. F. SCHAEFFNER with him on the brief; NORDLINGER, RIEGELMAN, BENETAR & CHARNEY, attorneys) for respondent-cross-appellant.

Cox, *J.*:

Newspaper Guild of New York, Local 3, ANG, CIO (hereinafter referred to as "Guild") moved to compel arbitration of controversies it claimed existed under a collective bargaining agreement with Brooklyn Eagle, Inc., (hereinafter referred to as "Employer"), dated November 30, 1952 affecting Employer's editorial and commercial department employees. The learned Special Term Justice has held that (1) the commencement of a strike by the Guild constituted a repudiation by the employees of the continued existence of the contract; (2) all claims based on acts or omissions arising subsequent to termination of the contract are not arbitrable under the contract and, accordingly, (3) the claims for severance and notice of dismissal pay may not be arbitrated, while claims for overtime, holiday and accrued vacation pay should be submitted to arbitration. Each party appeals from so much of the order entered as is adverse to it, though the Employer has since abandoned so much of the appeal as relates to holiday and overtime pay and argues for a reversal only in respect of vacation pay.

The agreement between the parties stipulates a two-year term ending November 29, 1954, and provides that within the period of 60 to 90 days prior to the fixed terminal date, either party may give notice of a desire to change the terms of the contract, in which event the parties were to promptly open and carry on with due diligence negotiations until terminated by either party and meanwhile maintain the status quo; and that "any dispute, claim, grievance or difference arising out of or relating to this agreement shall be arbitrated."

On September 1, 1954, the Guild gave notice of its desire to modify the contract "pursuant to the provisions of the Labor-Management Relations Act, 1947." The parties thereafter negotiated but failed to reach any agreement. On January 28, 1955, the Guild called a strike and the employees quit work. Up to that time the status quo had been maintained. Negotiations continued until March 8, 1955, when they terminated. On March 16, 1955, the Employer by letter addressed to the Guild formally terminated the negotiations and informed the Guild that it would never resume publication of the Brooklyn Eagle. On the same day, the Guild demanded severance, accrued vacation, unpaid overtime, holiday, notice of dismissal and sick leave pay and any other moneys due to the employees. Ten days later, the Guild served a demand for arbitration on those issues which the Employer rejected on the ground that no contract for arbitration existed.

The Employer claims that the Guild breached and terminated the contract (1) by calling a strike on January 28, 1955, thereby violating the status quo provisions of the contract, and (2) by terminating negotiations on March 8, 1955, in that it refused to meet with the Employer in joint session, as a consequence of which there was no agreement for arbitration in existence. The Guild contends that the Employer terminated the negotiations and in effect discharged all employees on March 16, 1955, when it wrote to

the Guild that because of the Guild's strike and refusal to meet in joint session with the Employer on March 8th an "insoluble impasse" had been reached and stated further "We agree that further negotiations will be futile, and we elect to, and hereby do, terminate them forthwith" and "We do not intend ever to resume publication of the newspaper."

The issues on this appeal are, therefore, limited to the propriety of the refusal to direct arbitration of the claims for vacation, severance and notice of dismissal pay.

The agreement of the parties expressly provides for overtime, vacation, holiday, severance, and notice of dismissal pay. Claims referable to such provisions certainly "arise out of or relate to" the contract, which specifically prescribes arbitration as the method for determination of all disputes. (Matter of Lipman v. Haeuser Shellac Co., 289 N. Y. 76; Application of Teschner, 285 App. Div. 435.)

The arbitration clause of the contract is phrased in the broadest and most comprehensive language, embracing "any dispute, claim, grievance or difference arising out of, or relating to," the agreement. The intention of the parties, manifest therein, to dispose of all of their disputes by arbitration should be enforced. (Riverbrand Rice Mills v. Latrobe Brewing Co., 305 N. Y. 36.)

Whether the contract has been terminated by acts of the employer or of the Guild is in dispute, and is, therefore, an issue determinable by the arbitrators. "Before compelling arbitration it was not necessary for the court to determine that the contract was either performed by one party or breached by the other." (Matter of Lipman v. Haeuser Shellac Co., supra, p. 80.) The mere circumstances, however, that a contract has been terminated does not foreclose the arbitration of issues which arise out of and relate to it. (Matter of Lane v. Endicott Johnson Corp., 274 App. Div. 833, aff'd 299 N. Y. 725.)

The fact that the Guild's right to arbitrate overtime and holiday pay claims is no longer contested would, perhaps, indicate that the continued operating existence of the contract is not a prerequisite to the enforcement of arbitration of issues arising under said contract. Of course, that concession, in and of itself does not necessarily imply that the issue of severance pay is arbitrable.

However, the Guild contends that severance pay as contemplated in the contract was earned and accrued contemporaneously with the rendition of services over the years during which the contract provision for severance pay was operative and that the time for payment of such benefits was deferred; consequently, it contends that this issue survives the termination of the contract. The argument thus advanced is a tenable one and the pattern and course of the parties' conduct might be influential in determining the issue. If the Guild can sustain its contention in this regard, the accrued benefits under the severance pay provisions do not perish with the agreement, survive its termination, and severance pay becomes payable on expiration of employment regardless of the date of termination of the contract.

Any inquiry, however, to determine whether or not such claim, or any claim, arises after the termination of the contract goes to the merits. It is a matter embraced within the general principle, to which reference is made in Matter of Lipman v. Haeuser Shellac Co., supra, at p. 80, that "all issues subsequent to the making of the contract are not for the court but for the arbitrators," and is therefore properly within their province.

The Guild here applied for an order directing that such claims be heard and determined by arbitrators. On such application, the court could not decide whether or not any such claim was valid. It was limited to a determination as to whether or not (1) a contract requiring arbitration exists between the parties; (2) a dispute exists within the

scope of the arbitration clause; and (3) one party to the dispute refuses to proceed to arbitration. (Matter of Spectrum Fabrics Corp., 285 App. Div. 710, aff'd 309 N. Y. 709; Matter of Lane v. Endicott Johnson Corp., 274 App. Div. 833, aff'd 289 N. Y. 725; Application of Teschner, supra; Crossett v. Mt. Vernon Housing Authority, 275 App. Div. 1051; Matter of Lipman v. Haeuser, supra.)

Even if the Guild violated the contract by calling a strike, that does not prevent it from invoking the arbitration called for in the contract (Application of Stewart, 285 App. Div. 953), and it is quite immaterial to a determination as to whether or not it is required that a specific claim be arbitrated that the provision for arbitration is found in a contract which has been terminated (Matter of Lane v. Endicott Johnson Corp., supra; Matter of Selly, 178 Misc. 1076; In re Commercial Telegraphers' Union, 123 N. Y. S. 2d 259). Whether the employer has incurred any liability for severance pay is to be determined by the arbitrators who are the judges of the law as well as the facts (Matter of Lipman v. Haeuser Shellac Co., supra; Matter of Spectrum Fabrics Corp., 285 App. Div. 710, 714). It was not the province of Special Term to attempt to pass on the merits of the application.

The order appealed from, in so far as it refused to direct arbitration on the claims for severance and notice of dismissal pay, should be reversed and arbitration directed on those claims; and in so far as said order directed arbitration on claims for overtime, holiday and accrued vacation pay, it should be affirmed.

All concur except Peck, *P. J.*, who dissents and votes to affirm.

APPENDIX B-3

(Opinion of the Court of Appeals of the State of New York, 2 N. Y. 2d 553, 141 N. E. 2d 841)

DYE, *J.*:

The petitioner-respondent, Newspaper Guild of New York, Local 3, ANG, CIO, hereinafter called "Guild" and the respondent-appellant, Brooklyn Eagle, Inc., hereinafter called the "Publisher", under date of November 30, 1952, entered into a collective bargaining agreement affecting the employees in the Publisher's editorial and commercial departments. The agreement was for a period of two years unless changed by mutual consent. If either party desired to change the terms, it could give notice of its desire to the other "Not more than 90 days and not less than 60 days prior to the expiration * * * thereof", in which event, negotiations were to commence immediately and "proceed with all due diligence." It further provided that: "If an agreement has not been reached by the date upon which this agreement expires, status quo conditions shall be maintained during negotiations unless and until such negotiations are terminated by either party" (§ 27).[1] By letter

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[1] "This agreement shall, unless changed by mutual consent, be in effect from its date for a period of two years.

"Section 5—Minimum Wages, Section 6—General Wage Increase, Section 10—Severance Indemnity, and Section 11—Vacations, may be reopened as of December 1, 1953, upon written notice of either party to the other given not more than 90 days and not less than 60 days prior to December 1, 1953. If agreement upon any reopened matters shall not be reached by December 1, 1953, such matters shall be submitted to arbitration under the rules provided by Section 21, Grievance Committee.

"Not more than 90 days and not less than 60 days prior to the expiration of this agreement, either party may give to the other party notice of desire to change the terms thereof. In the event of such notice, negotiations shall be immediately entered into and proceed with all due diligence. If an agreement has not been reached by the date upon which this agreement expires, status quo conditions shall be maintained during negotiations unless and until such negotiations are terminated by either party."

dated September 1, 1954, which was within the time limitation provided therefor, the Guild notified the employer of its desire to modify the collective bargaining agreement and requested a joint conference at a mutually convenient date. Thereafter the parties negotiated in joint session both prior to and subsequent to November 30, 1954, the expiration date of the contract, but without reaching a mutually satisfactory agreement.

On January 28, 1955 the Guild, acting upon the instructions of the affected employees, called a strike. Nonetheless, negotiations continued earnestly and in good faith in an effort to reach a new agreement until broken off on or about March 8, 1955. Thereafter, by letter dated March 16, 1955, the Publisher notified the Guild that "an insoluble impasse" had been reached and that since further negotiations would "be futile", "we elect to, and hereby do, terminate them forthwith." The Publisher also advised the Guild that: "The consequences of the strike have destroyed the Brooklyn Eagle and we do not intend ever to resume publication of the newspaper." On the same day, the Guild notified the Publisher via Western Union that, because of its announced intention to suspend publication of its newspaper, the employee benefit provisions of the collective bargaining agreement were deemed operative and demanded that Publisher immediately: "remit all severance pay, accrued vacation pay, unpaid overtime and holidays, notice of dismissal pay, sick leave pay and any and all other benefits earned by your employees * * * up to January 29, 1955".

When the Publisher rejected these demands, the Guild moved at Special Term, pursuant to section 1450 of the Civil Practice Act, to compel the Publisher to proceed to arbitration in accordance with its collective bargaining

agreement.[2] The Special Term granted petitioner's motion in all respects except insofar as it sought arbitration of severance and notice of dismissal pay.

Upon appeal, the Appellate Division, First Department, reversed so much of the Special Term order as had refused to direct arbitration on the claims of severance and notice of dismissal pay, made new findings and conclusions of law in respect thereto, directed that arbitration proceed as to those claims and, as so modified, affirmed.

In this appeal, taken as of right, the appellant Publisher challenges only so much of the order as granted petitioner-respondent's motion to compel arbitration of claims for severance, notice of dismissal and vacation pay. The appellant argues that since the *status quo* ended on either (as found by Special Term) January 28, 1955, the date of the strike, or (as found by the Appellate Division) on March 8, 1955, the date joint sessions ended, there was no agreement in existence on March 16, 1955, the date the Publisher elected to terminate negotiations; in other words, that the alleged claims for employee benefits did not accrue until after the agreement had terminated, thus raising an issue as to whether the claims have any basis in the collective bargaining agreement which the court and not the arbitrators should decide. The appellant cites *Alpert* v. *Admiration Knitwear Co.* (304 N. Y. 1) and *Matter of General Elec. Co.* (*United Elec. Workers*) (300 N. Y. 262) to sup-

[2] Arbitration Agreement dated November 30, 1952 provides: "Section 21 * * * (b) Any dispute, claim, grievance or difference arising out of or relating to this agreement which the Guild and the Publisher have not been able after reasonable effort to settle, shall be submitted to arbitration upon notice of either party to the other, under the labor arbitration rules then obtaining of the American Arbitration Association. The parties agree to abide by the award subject to such rules and regulations as any Federal agency having jurisdiction may impose. The parties further agree that there shall be no suspension of work over an issue which is in dispute and is in process of arbitration. The expenses of an arbitration shall be borne equally by the parties."

port its position. Both *Alpert* and *General Electric* are distinguishable. In *Alpert*, purchasers of woolen goods had failed to establish financial responsibility, as required by the contract which the seller elected to cancel; consequently, no question remained which could properly be submitted to arbitration. In *General Electric*, we held that an antidiscrimination clause in one contract could not be invoked to compel arbitration of a dispute arising out of another. Thus, both *Alpert* and *General Electric* stand only for the proposition that if, under the clear terms of an agreement calling for arbitration, there has been no default, the court may not make an order compelling a party accused of default to arbitrate. While it is true that whether or not a bona fide dispute exists is for the court (*Matter of Wenger & Co.* v. *Propper Silk Hosiery Mills*, 239 N. Y. 199), it is equally true that in a proceeding to compel arbitration the question for the court to pass upon is whether the written contract provides for arbitration and, if so, whether there was a failure to proceed with the obligation to arbitrate (*Matter of Kahn* [*National City Bank*], 284 N. Y. 515). The question of performance goes to the merits and is a matter for the arbitrators whenever it appears that the parties have so consented (*Matter of Lipman* [*Kreuser Shellac Co.*], 289 N. Y. 76, motion for reargument denied 289 N. Y. 647); and when such consent is given, the courts of New York will give it effect (*Matter of River Brand Rice Mills* v. *Latrobe Brewing Co.*, 305 N. Y. 36). Whether the "status quo" ended on January 28 or March 8, 1955—due to the conduct of the Guild—as contended by the appellants, or on March 16—due to the acts of the Publisher—as claimed by the respondents, does not prevent the latter from invoking arbitration as called for in the agreement, since the issue is not whether petitioner is right, but whether it is entitled to have the issues determined in the forum designated in the agreement (*Matter of Lane* [*Endicott Johnson Corp.*], 274 App. Div. 833, affd. 299 N. Y. 725; cf. *Matter of Selly* [*French*

Tel. Cable Co.], 178 Misc. 1076). When these parties executed the within collective bargaining agreement containing the broad and comprehensive language "Any dispute * * * arising out of or relating to" (n. 2, *supra*), they must be deemed to have intended the enforcement of its terms by arbitration. Accordingly, whether or not the Guild called the strike in breach of the "no strike" clause constitutes no defense to this motion to compel arbitration (*Matter of Kahn* [*National City Bank*], *supra*). Furthermore, it has long been the rule that striking employees do not lose their status as employees; this was so at common law (*Jeffery-De Witt Insulator Co.* v. *National Labor Relations Bd.*, 91 F. 2d 134, cert. denied 302 U. S. 731), a principle now embedded in our State statute (Labor Law, § 701, subd. 3; cf. *Degnan* v. *Metropolitan Life Ins. Co.*, 178 Misc. 312) and Federal statutes regulating labor relations (U. S. Code, tit. 29, § 152, subd. [3]; cf. *Labor Bd.* v. *Mackay Co.*, 304 U. S. 333).

The collective bargaining agreement makes specific provisions for severance, dismissal and vacation pay under certain named conditions. Whether these conditions have been satisfied is a matter of sharp dispute and one which necessarily arises out of and relates to the contract. While the employees could have brought suit for the amount allegedly due them, absent any other remedy, the Guild as the chosen bargaining representative and the Publisher consented to a settlement of any dispute arising out of and relating to the agreement—and this includes the controverted items of pay—by arbitration, a remedy which they primarily and exclusively placed within the jurisdiction of the arbitral tribunal (cf. *Matter of Teschner* [*Livingston*], 285 App. Div. 435, affd. 308 N. Y. 972; *Matter of Compagnie Francaise des Petroles* [*Pantepec Oil Co.*], 279 App. Div. 851 [1st dept.], affd. 305 N. Y. 588; *Matter of Lane* [*Endicott Johnson Corp.*], *supra*). On this record we are satisfied that the motion to compel arbitration was properly granted. We pass on no other question.

The order appealed from should be affirmed, with costs.

VAN VOORHIS, *J.* (dissenting):

Brooklyn Eagle, Inc., has appealed from an order of the Appellate Division insofar as it granted a motion by Newspaper Guild of New York, Local 3, to compel arbitration of claims for severance pay, notice of dismissal pay and vacation pay. On March 16, 1955 the *Brooklyn Eagle* went out of business permanently and notified its employees to that effect. It has been ordered to submit to arbitration under a collective bargaining agreement that had previously expired, except for a clause providing that if negotiations were begun for its renewal prior to expiration (as they were), "status quo conditions shall be maintained during negotiations unless and until such negotiations are terminated by either party." Such negotiations continued until the Guild members struck on January 28, 1955 in violation of a no strike clause. This effectively terminated the *status quo* conditions. As Justice HECHT said at Special Term: "A 'status quo' *binding only on the employer* was manifestly not what was intended by the contractual provision for continuation of the 'status quo' pending negotiations" (italics from original).

The Appellate Division's opinion concedes: "On January 28, 1955, the Guild called a strike and the employees quit work. Up to that time the *status quo* had been maintained. Negotiations continued until March 8, 1955, when they terminated."

The negotiating committee of the Guild refused to meet in joint session with the *Brooklyn Eagle's* negotiating committee on March 8, 1955. Refusal to meet with the negotiators of the other party constituted, as matter of law, termination of such negotiations "by either party", which ended the life of the labor contract according to its own terms not later, in any event, than March 8, 1955. The employees were discharged one week later upon the

announcement of the decision of the newspaper to retire from business.

Upon the same day, the Guild demanded, among other matters, severance pay, notice of dismissal pay and vacation pay. When payment was refused, the Guild demanded that the controversy be arbitrated.

Subdivision (b) of section 21 of the agreement contains a general arbitration clause of: "Any dispute, claim, grievance or difference arising out of or relating to this agreement which the Guild and the Publisher have not been able after reasonable effort to settle".

Both Special Term and the Appellate Division held that none of these claims is required to be arbitrated unless it accrued while the contract was in force. It is, of course, the law that the circumstance that a contract is ended does not prevent the arbitration of issues which arose before its termination (*Matter of Lane* [*Endicott Johnson Corp.*], 274 App. Div. 833, affd. 299 N. Y. 725). In order to render that rule applicable, however, the asserted rights must have grown out of the contract while it was in effect.

It cannot be disputed on any version of the facts that this contract ended January 28 or at the latest March 8, 1955.

A collective bargaining agreement is not different from other contracts in these regards (*System Federation No. 59 of Ry. Employees* v. *Louisiana & Ark. Ry. Co.*, 119 F. 2d 509; *Paterson Parchment Paper Co.* v. *International Brotherhood of Paper Makers*, 191 F. 2d 252, cert. denied 342 U. S. 933; *Cardenas* v. *Wilson & Co.*, 180 F. 2d 828, cert. denied 304 U. S. 812), and arbitration clauses in labor contracts are specifically held to be binding with respect only to controversies which had their origin during the life of the contract (*Matter of Lane* [*Endicott Johnson Corp.*], 274 App. Div. 833, affd. 299 N. Y. 725, *supra*, cert. denied 338 U. S. 892; *Alpert* v. *Admiration Knitwear Co.*, 304 N. Y. 1).

The decisive factor is whether the *Brooklyn Eagle's* employees became legally entitled to these fringe benefits before the contract terminated on January 28 or at the latest March 8, 1955. If liability for these items attached after the agreement ended, there is no arbitrable dispute and the application to compel arbitration should be denied (*Matter of General Elec. Co.* [*United Elec. Workers*], 300 N. Y. 262; *Matter of Essenson* [*Upper Queens Med. Group*], 307 N. Y. 68; *Matter of International Assn. of Machinists* [*Cutler-Hammer, Inc.*], 271 App. Div. 917, affd. 297 N. Y. 519).

Special Term allowed arbitration for overtime, holiday and vacation pay. To these the Appellate Division added severance and notice of dismissal pay. Appellant Brooklyn Eagle asks for modification to eliminate arbitration of severance, notice of dismissal and vacation pay.

These items, it seems to me, to whatever extent they may be payable, had their origin after the labor contract ended. These employees were dismissed when the *Brooklyn Eagle* went out of business March 16, 1955. Although severance and dismissal pay are computed by the length of time during which the employees had worked for the company, these charges in no sense become a liability until dismissal. The law in this State is settled that such pay is liquidated damages for a dismissal (*Wanhope* v. *Press Co.*, 256 App. Div. 433, affd. 281 N. Y. 607; *Barth* v. *Addie Co.*, 271 N. Y. 31). It is so held in other jurisdictions (*Matter of Port Pub. Co.*, 231 N. C. 395; *McCloskey* v. *Division of Labor Law Enforcement*, 200 F. 2d 402; *Talberth* v. *Guy Gannett Pub. Co.*, 149 Me. 286; *Ackerson* v. *Western Union Tel. Co.*, 234 Minn. 271).

All of these decisions were guided by the contingent nature of severance or dismissal pay. Until an employee is dismissed, it cannot be legally ascertained whether he will be dismissed, and the obligation has no existence until

dismissal occurs. Consequently it seems to me that under no theory could any obligation of this nature have arisen prior to March 16, 1955, which was after this labor contract had ended.

A similar principle applies to vacation pay (*Wanhope* v. *Press Co.*, 281 N. Y. 607, *supra*). It was held in that case that upon dismissal prior to vacation period, no rights to vacation pay had accrued. To the same effect is *Bondio* v. *Joseph Binder, Inc.*; 24 So. 2d 398 [La. Ct of Appeals]).

The order appealed from should be modified so as to eliminate the direction compelling arbitration of severance, notice of dismissal and vacation pay, and, as so modified, affirmed, with costs to appellant.

DESMOND, FULD, FROESSEL and BURKE, *JJ.*, concur with DYE, *J.*; VAN VOORHIS, *J.*, dissents in an opinion in which CONWAY, *Ch. J.*, concurs.

Order affirmed.

(Memorandum Decision, Dated July 3, 1957, of the Court of Appeals of the State of New York Denying Motion for Reargument or, in the Alternative, to Amend the Remittitur 3 N. Y. 2d —, — N. E. 2d —)

"Motion for reargument or, in the alternative, to amend the remittitur denied with ten dollars costs and necessary printing disbursements."

APPENDIX C

Record Showing First Federal Question Raised

(As to the Second Federal Question Raised, see page 8, *supra*)

(Notice of Motion and Affidavit for Reargument, or, in the Alternative, to Amend the Remittitur)

COURT OF APPEALS

OF THE STATE OF NEW YORK

In the Matter

of

M. MICHAEL POTOKER, as Secretary-Treasurer of NEWSPAPER GUILD OF NEW YORK, LOCAL 3, ANG, CIO,
Petitioner-Respondent,

and

BROOKLYN EAGLE, INC.,
Respondent-Appellant.

Sirs:

PLEASE TAKE NOTICE that upon the record on appeal herein filed and presented to this Court, the argument of the appeal, the decision and opinion of this Court handed down on April 4, 1957, the remittitur dated April 4, 1957, and the annexed affidavit of David L. Benetar, sworn to on May 13, 1957, a motion will be made to this Court, at the Court House in the City of Albany, New York, on the 20th day of May, 1957, at the opening of Court on that day for reargument or, in the alternative, to amend the remittitur to certify that this Court considered the follow-

ing question involving Federal law—whether as a matter of law exclusive jurisdiction of this matter is in the Federal district courts by virtue of Section 301(a) of the Labor Management Relations Act, 1947, and other related and relevant statutes of the United States, and for such other and further relief as to the Court may seem just and proper.

Date: New York, New York,
May 13, 1957

Yours, etc.,

NORDLINGER RIEGELMAN BENETAR & CHARNEY
Attorneys for Respondent-Appellant,
Brooklyn Eagle, Inc.
Office & P. O. Address,
420 Lexington Avenue
Borough of Manhattan
City of New York

To:

COOPER, OSTRIN & DE VARCO
Attorneys for Petitioner-Respondent
Office & P. O. Address
655 Madison Avenue
Borough of Manhattan
City of New York

COURT OF APPEALS

OF THE STATE OF NEW YORK

In the Matter

of

M. MICHAEL POTOKER, as Secretary-Treasurer of Newspaper Guild of New York, Local 3, ANG, CIO,

Petitioner-Respondent,

and

BROOKLYN EAGLE, INC.,

Respondent-Appellant.

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

DAVID L. BENETAR, being duly sworn, deposes and says:

I am a member of the firm of Nordlinger, Riegelman, Benetar & Charney, the attorneys for the Brooklyn Eagle, Inc., the Respondent-Appellant herein.

The above entitled matter was argued on November 14, 1956, and the decision and opinion of this Court was handed down on April 4, 1957.

The present application is for reargument or, in the alternative, to amend the remittitur to certify that this Court considered the following question involving Federal law—whether as a matter of law exclusive jurisdic-

tion of this matter is in the Federal district courts by virtue of Section 301(a) of the Labor Management Relations Act, 1947, and other related and relevant statutes of the United States.

The grounds on which both branches of this motion are made are set forth in our accompanying brief to which reference is hereby made.

/s/ David L. Benetar

Sworn to before me this
13th day of May, 1957.

Herman D. Schultz
Notary Public, State of New York
No. 03-3540635
Qualified in Bronx County
Certificate Filed in New York County
Term Expires March 30, 1959

(Letter Dated June 7, 1957, from the Deputy Clerk of the Court of Appeals of the State of New York Addressed to the Attorneys for the Petitioner)

STATE OF NEW YORK

COURT OF APPEALS

RAYMOND J. CANNON
Clerk

GEARON KIMBALL
Deputy Clerk

Clerk's Office
Albany 7
June 7, 1957

Nordlinger, Riegelman, Benetar & Charney, Esqs.
Counsellors at Law
420 Lexington Avenue
New York, N. Y.

Re: Matter of Potoker v. Brooklyn Eagle, Inc.,
Calendar No. 228

Dear Sirs:

The Supreme Court of the United States, on Monday of this week, decided the following three cases: Goodall-Sanford, Inc. v. United Textile Workers of America; General Electric Co. v. Local 205, United Electrical Workers; Textile Workers Union of America v. Lincoln Mills of Alabama.

In view of the fact that the papers on the motion for reargument of, or to amend the remittitur on, the above-entitled appeal refer to these cases the Court has requested us to write counsel, advising that they may comment on the effect of these recent decisions on the pending motion by letter within the next few days, if they so desire.

Yours very truly,

GEARON KIMBALL
Deputy Clerk

GK:wb

APPENDIX D

(Order and Judgment of the Court of Appeals)

STATE OF NEW YORK, COUNTY OF NEW YORK, ss.:

I, ARCHIBALD R. WATSON, County Clerk and Clerk of the Supreme Court, New York County, do hereby certify that I have compared the attached paper, consisting of 4 pages, with the original thereof filed in my office and that same is a correct transcript of the original and of the whole thereof.

IN WITNESS WHEREOF I have hereunto set my hand and affixed my official seal.

ARCHIBALD R. WATSON,
County Clerk and Clerk of the
Supreme Court, New York County.
(SEAL)

No. 228

COURT OF APPEALS

STATE OF NEW YORK, ss.:

PLEAS in the Court of Appeals, held at Court of Appeals Hall, in the City of Albany, on the 4th day of April in the year of our Lord one thousand nine hundred and fifty-seven, before the Judges of said Court.

Witness,

The HON. ALBERT CONWAY,
Chief Judge, Presiding.

RAYMOND J. CANNON, Clerk.

Remittitur April 4, 1957.

No. 228.

In the Matter of

M. Michael Potoker, as Secretary-Treasurer of Newspaper Guild of New York, Local 3, ANG, CIO,

Respondent,

and

Brooklyn Eagle, Inc.,

Appellant.

Be it remembered, That on the 28th day of July in the year of our Lord one thousand nine hundred and fifty-six, Brooklyn Eagle, Inc., the appellant in this cause, came here unto the Court of Appeals, by Nordlinger Riegelman Benetar & Charney, its attorneys, and filed in the said Court a Notice of Appeal and return thereto from the order of the Appellate Division of the Supreme Court in and for the First Judicial Department. And M. Michael Potoker, as Secretary-Treasurer of Newspaper Guild of New York, Local 3, ANG, CIO, the respondent in said cause, afterwards appeared in said Court of Appeals by Cooper, Ostrin & DeVarco, his attorneys.

Which said Notice of Appeal and the return thereto, filed as aforesaid, are hereunto annexed.

Whereupon, The said Court of Appeals having heard this cause argued by Mr. David L. Benetar, of counsel for the appellant, and by Mr. H. Howard Ostrin, of counsel for the respondent, and after due deliberation had thereon, did order and adjudge that the order of the Appellate Division of the Supreme Court appealed from herein be and the same hereby is affirmed, with costs.

And it was also further ordered, that the records aforesaid, and the proceedings in this Court, be remitted to the said Supreme Court, there to be proceeded upon according to law.

THEREFORE, it is considered that the said order be affirmed, with costs as aforesaid.

And hereupon, as well the Notice of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said Court of Appeals remitted into the Supreme Court of the State of New York before the Justices thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said Supreme Court, before the Justices thereof, &c.

RAYMOND J. CANNON,
Clerk of the Court of Appeals
of the State of New York.

COURT OF APPEALS, CLERK'S OFFICE
Albany, April 4, 1957.

I HEREBY CERTIFY, that the preceding record contains a correct transcript of the proceedings in said cause in the Court of Appeals, with the papers originally filed therein, attached thereto.

RAYMOND J. CANNON,
Clerk.

(Seal)

(Order on Remittitur from Court of Appeals at Special Term, Part II of the Supreme Court of the State of New York, County of New York)

At a Special Term, Part II of the Supreme Court, New York County, held in and for the County of New York, at the Court House, in the City of New York, State of New York on the 30th day of April, 1957.

Present:

HON. HENRY EPSTEIN,

Justice.

4999/55

ORDER

In the Matter of

M. MICHAEL POTOKER, as Secretary-Treasurer of NEWSPAPER GUILD OF NEW YORK, LOCAL 3, ANG, CIO,

Petitioner,

and

BROOKLYN EAGLE, INC.,

Respondent.

The above-named respondent, having appealed to the Court of Appeals from the order of the Appellate Division, First Department, duly entered on the 17th day of January 1956, in the office of the Clerk of that Court, and the Court of Appeals having heard said appeal and ordered and adjudged that the order so appealed from be affirmed, with costs to the petitioner, and the remittitur from the Court of Appeals having been duly filed in the office of the Clerk of New York County,

Now, on motion of Cooper, Ostrin & DeVarco, attorneys for petitioner,

IT IS ORDERED that the said order of the Court of Appeals be, and the same hereby are made the order of this court; and that the order of the Appellate Division, First Department entered in the office of the Clerk of that court on the 17th day of January, 1956 be and the same hereby is affirmed; and that costs be taxed against the respondent herein.

Enter,

H. E.,
J. S. C.

(Order of the Court of Appeals Denying Motion for Reargument or, in the Alternative, to Amend the Remittitur)

STATE OF NEW YORK

IN COURT OF APPEALS

At a Court of Appeals for the State of New York, held at Court of Appeals Hall in the City of Albany on the third day of July A. D. 1957.

Present:

HON. ALBERT CONWAY,
Chief Judge, presiding.

Mo. No. 240

In the Matter of

M. MICHAEL POTOKER, as Secretary-Treasurer of NEWSPAPER GUILD OF NEW YORK, LOCAL 3, ANG, CIO,

Respondent,

and

BROOKLYN EAGLE, INC.,

Appellant.

A motion for reargument or, in the alternative, to amend the remittitur in the above cause having been heretofore made upon the part of the appellant herein and papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motion be and the same hereby is denied with ten dollars costs and necessary printing disbursements.

A copy

RAYMOND J. CANNON
Clerk

(Seal of
Court of Appeals)

(Order of Special Term, Part II, of the Supreme Court of the State of New York, County of New York, Making the Order of the Court of Appeals the Order of the Supreme Court of the State of New York, County of New York)

STATE OF NEW YORK, COUNTY OF NEW YORK, ss.:

I, ARCHIBALD R. WATSON, County Clerk and Clerk of the Supreme Court, New York County, do hereby certify that I have compared the attached paper, consisting of 3 pages, with the original thereof filed in my office and that same is a correct transcript of the original and of the whole thereof.

IN WITNESS WHEREOF I have hereunto set my hand and affixed my official seal.

ARCHIBALD R. WATSON,
County Clerk and Clerk of the Supreme Court, New York County.

(SEAL)

ENS:em

At a Special Term, Part II of the Supreme Court, New York County, held in and for the County of New York, at the Court House, in the City of New York, State of New York on the 6th day of August, 1957.

Present:

HON. HAROLD A. STEVENS,
Justice.

4999/55

ORDER

In the Matter of

M. MICHAEL POTOKER, as Secretary-Treasurer of NEWSPAPER GUILD OF NEW YORK, LOCAL 3, ANG, CIO,
Petitioner,

and

BROOKLYN EAGLE, INC.,
Respondent.

The above-named respondent having, in the Court of Appeals, made a motion for reargument or, in the alternative, to amend the remittitur in this cause, and papers having been submitted on said motion, and after due deliberation the Court of Appeals having denied the motion with ten dollars costs and necessary printing disbursements to the petitioner, and the order of the Court of Appeals having been duly filed in the office of the Clerk of New York County, it is,

ORDERED that the order of the Court of Appeals be and the same hereby is made the order of this Court.

Enter

H. A. S.,
J. S. C.

Filed
Aug. 6 1957
New York
Co. Clerk's Office

Office - Supreme Court, U.S.
FILED
OCT 22 1957
JOHN T. FEY, Clerk

Supreme Court of the United States

October Term, 1957

No. 498

BROOKLYN EAGLE, INC.,

Petitioner,

vs.

M. MICHAEL POTOKER, as Secretary Treasurer of Newspaper Guild of New York, Local 3, ANG, CIO,

Respondent.

PETITIONER'S REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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of Counsel.

IN THE

Supreme Court of the United States

October Term, 1957

No. 498

BROOKLYN EAGLE, INC.,

Petitioner,

vs.

M. MICHAEL POTOKER, as Secretary-Treasurer of Newspaper Guild of New York, Local 3, ANG, CIO,

Respondent.

PETITIONER'S REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Our petition, we believe, establishes that the question of federal preemption of the enforcement of arbitration agreements affecting commerce * is one requiring an authoritative answer by this Court. Indeed, there is nothing to the contrary in respondent's brief. The present reply brief is submitted to refute respondent's first argument (Brief, pp. 4-8) why the question should not be answered promptly—and in this case.

Respondent's argument that the federal question was not timely raised below is completely without merit (*Shea* v. *Export Steamship Corp.*, 253 N. Y. 17 at 21, quoted at p. 7 of petition). The point, involving as it does jurisdiction of the subject matter, could be raised at any time. It could never be waived; and, as we have seen, it was not waived under the New York State practice. Even if the word "timely" were synonymous with "promptly" in this context, the petitioner's presentation of the point was timely. The *Guss* case (353 U. S. 1) and the other cases

---

* There is no real question in this case as to the status of the Brooklyn Eagle, Inc. in interstate commerce. The National Labor Relations Board has twice exercised jurisdiction over it (*In re Brooklyn Daily Eagle and Newspaper Guild of New York*, 13 N. L. R. B., No. 103, 14 N. L. R. B., No. 11, 4 LRRM 371; *In re Brooklyn Daily Eagle and Newspaper Guild of New York*, 18 N. L. R. B., No. 17, 5 LRRM 613).

decided with it, which settled the preemptive effect of other portions of the Labor Management Relations Act, 1947 (cited at pp. 11-12 of our petition), were not decided until March 25, 1957, several months after the present case had been argued in the New York Court of Appeals. The *Goodall-Sanford, Inc.* case (353 U. S. 550) and the other cases decided with it, which for the first time authoritatively settled the jurisdiction of the federal courts in the enforcement of arbitration provisions of collective bargaining agreements affecting commerce (cited at p. 9 of our petition) were not decided by this Court until after the decision of the appeal in this case by the New York Court of Appeals. Indeed, in our motion for reargument in the New York Court of Appeals we pointed out that *certiorari* had been granted by this Court in those cases but that they had not yet been decided by this Court. Under these circumstances, we submit that our presentation of the point was clearly timely. (Cf. *Brinkerhoff-Faris Trust & Savings Co.* v. *Hill*, 281 U. S. 673, 678, 50 S. Ct. 451).

Respondent argues that denial by the New York Court of Appeals of petitioner's motion in the alternative for reargument or for amendment of the remittitur is a conclusive adjudication that the federal question was not considered below. We do not accept this conclusion either as a matter of law or as an inference of fact. It seems an especially tenuous inference to draw in this highly sensitive field of ouster of state court jurisdiction, and all the more so in view of the unusual step taken by the Court of Appeals in expressly inviting discussion of the point (our petition, pp. 7-8, 41). In any event, it is unquestionable that either the Court of Appeals actually considered the question or that it was under a duty to do so. As we have seen, it is settled as a matter of New York procedural law that this question of jurisdiction of the subject matter could be raised at any stage and indeed must be considered by the state court on its own motion even if not raised at any time by anyone. This Court has held (*Williams* v. *Georgia*, 349 U. S. 375, 383, 75 S. Ct. 814) that " • • • where a State allows questions of this sort to be raised at a late stage and

be determined by its courts [even]* as a matter of discretion, we are not concluded from assuming jurisdiction and deciding whether the state court action in the particular circumstances is, in effect, an avoidance of the federal right." (See also *Rogers* v. *Alabama*, 192 U. S. 226, 230-231, 24 S. Ct. 257).

Until the question of preemption in these cases is authoritatively answered by this Court, a growing volume of litigation on this subject will arise all over the country. For example, it has already arisen in a New York case, decided after the date of this petition, in which a New York Supreme Court justice has concluded that the state court's jurisdiction is concurrent and has not been ousted. [*In re Steinberg* (N. Y. Sup. Ct., N. Y. Co., September 17, 1957), 40 LRRM 2619.]

Respondent does not argue, as indeed it hardly could, against the growing importance and urgency of the question which we have raised. Its main opposition to acceptance of the case by this Court is in the form of procedural hurdles which, in our view, are without substance or merit. They are totally inadequate to block an early, final and authoritative pronouncement by this Court on the question involved.

Dated: October 18, 1957.

Respectfully submitted,

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A. F. SCHAEFFNER,
of Counsel.

* Added by us.

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FILED
OCT 16 1957
JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 498.

BROOKLYN EAGLE, INC.,

Petitioner,

vs.

M. MICHAEL POTOKER, as Secretary-Treasurer of Newspaper Guild of New York, Local 3, ANG, CIO,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 498.

BROOKLYN EAGLE, INC.,

Petitioner,

vs.

M. MICHAEL POTOKER, as Secretary-Treasurer of Newspaper Guild of New York, Local 3, ANG, CIO,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

Respondent Newspaper Guild opposes the granting of a writ of certiorari on three grounds:

(1) The federal question was not timely raised in the state court.

(2) The record is devoid of evidence that the parties are subject to the Labor Management Relations Act, 1947.

(3) The LMRA does not divest state courts of jurisdiction over proceedings to compel arbitration.

Proceedings in the New York Courts.

The Civil Practice Act of the State of New York (Article 84, Section 1448 *et seq.*), provides a summary procedure for the enforcement of arbitration agreements. In accord-

ance with this provision, Respondent, in April 1955, moved in the New York County Supreme Court for an order directing Petitioner to arbitrate a demand on behalf of 315 employees for severance, dismissal, vacation, overtime and holiday pay (folios 17-54).*

The motion was granted in part and denied in part (Appendix, pp. 18-21). Thereafter, successive appeals were taken to the Appellate Division of the Supreme Court, First Department (Appendix, pp. 22-27), and the New York Court of Appeals (Appendix, pp. 28-36). Both appellate courts sustained Respondent's contentions in their entirety and directed Petitioner to arbitrate all disputed claims.

The litigation up to this point spanned a period of nearly two years. Throughout this entire time Petitioner never once claimed that the New York courts lacked jurisdiction over the controversy.

The majority opinion of the Court of Appeals concludes with the statement: "On this record we are satisfied that the motion to compel arbitration was properly granted. We pass on no other question" (Appendix, p. 32).

Not until a month after the Court of Appeals had announced its decision was the first and only attempt made to introduce even the semblance of a federal question. Then, on a motion for leave to reargue or, in the alternative, to amend the remittitur, Petitioner belatedly raised the question of whether under Section 301 of the Labor Management Relations Act, 1947, federal courts have exclusive jurisdiction over actions to compel arbitration (Appendix, pp. 37-40).

---

* The reference is to folios of the record of the New York Court of Appeals.

Summary of Facts.

By letter dated September 1, 1954, Respondent served notice on Petitioner of its desire to modify their collective bargaining agreement, which by its terms was to expire on November 29, 1955 (folios 37-9). After weeks of fruitless negotiations, no settlement was reached by that date (folio 71), and from then on Respondent's right to strike was absolute.

Nevertheless, of its own volition Respondent relinquished the immediate and unqualified opportunity to take strike action, and all employees remained at work as efforts to reach a settlement continued (folio 71). On January 28, 1955, despairing of a peaceful solution after almost five months of futile negotiations, the employees struck (folio 71). Negotiations, however, continued by mutual desire and consent.

The strike was in all respects lawful. At the time, Petitioner neither protested nor challenged Respondent's right to call it. Present assertions that the strike violated the agreement are unsupported as well as immaterial.

On March 16, 1955, Petitioner unilaterally terminated negotiations and discharged all employees. It stated in a letter of that date addressed to Respondent (folios 40-45):

> "We agree that further negotiations will be futile, and we elect to, and hereby do, terminate them forthwith.
>
> • • • • • •
>
> ". . . we do not intend ever to resume publication of the newspaper.",

Upon Petitioner's rejection of claims for severance, vacation, dismissal, holiday and overtime pay on behalf of the discharged employees, Respondent in accordance with

Section 21 (b) of the agreement demanded arbitration of the controversy (folios 46-51). Petitioner's refusal to arbitrate (folios 52-54), resulted in Respondent's motion to compel arbitration under Article 84 of the New York Civil Practice Act (folios 18-54).

POINT I.

The federal question was not timely raised below nor was it considered and this Court therefore lacks jurisdiction to review it on appeal.

The only federal question asserted below—and that on an application for leave to reargue—was that Section 301 of the Labor Management Relations Act, 1947 totally ousted state courts from jurisdiction of actions to compel arbitration between employers and labor unions in interstate commerce.

At this late date, Petitioner contends that a second federal question was raised below, namely: Does a strike, allegedly in violation of a collective agreement, result in automatic termination of employment? We will later show that this point, while urged in the form of a defense to the motion to compel arbitration, was never raised as a federal question.

On the basis of the record, we believe that the jurisdiction of this Court cannot be invoked. As was said in *Bowe v. Scott*, 233 U. S. 658, 663 (1914):

> "... it is elementary that a mere assertion in a state court of a right under the Constitution of the United States in a petition for rehearing affords no grounds for invoking the jurisdiction of this court unless the court below in dealing with the petition for rehearing considers and passes upon the Federal ground therein relied upon...."

Similar holdings are legion, e.g.:

St. Louis and San Francisco RR. Co. v. *Shepherd*, 240 U. S. 240 (1916);

Herndon v. *State of Georgia*, 295 U. S. 441 (1935);

Forbes v. *State Council*, 216 U. S. 396 (1909);

McMillen v. *Ferrum Mining Co.*, 197 U. S. 343 (1905).

The following is undeniable from the record:

(1) The question of exclusive jurisdiction of the federal courts was first presented in an application to the Court of Appeals for reargument or in the alternative to amend the remittitur (Appendix, pp. 37-40).

(2) The order of the Court of Appeals denied without comment both the request for reargument and the request to amend the remittitur (Appendix, p. 47).

We think that the order on its face shows that the federal question was not considered. This is emphasized by the refusal of the court to amend the remittitur. In its brief in support of the application for reargument or amendment of the remittitur, Petitioner closed with the following statement to the Court of Appeals:

> "Should the Court disagree with our construction of the United States Supreme Court decisions and our interpretation of the state of the law today, we respectfully ask, in the alternative to our request for reconsideration, that this Court amend the remittitur and certify that it has considered the question posed in these papers.
>
> It is our intention, if the first branch of this motion is denied, to apply for a writ of *certiorari* to the United States Supreme Court, and we desire

> the record to show that this point has been presented."

Plainly, by declining to amend the remittitur in the face of these remarks, the Court of Appeals must have intended to make it clear that it was not considering the question posed.

In a tortuous effort to establish that the question was considered, Petitioner includes in the Appendix (p. 41), a letter dated June 7, 1957, from the Clerk of the Court of Appeals, advising counsel that they may "if they so desire" comment on the recent decisions of this Court in *Goodall Sanford, Inc.* v. *United Textile Workers of America; General Electric Co.* v. *Local 205, United Electrical Workers; Textile Workers Union of America* v. *Lincoln Mills of Alabama.*

This letter, we submit, no more constituted passing upon a federal question than did the denial of a petition for rehearing "on mature consideration." *Forbes* v. *State Council,* 216 U. S. 396, 399. As this Court there stated:

> "But it must appear that such federal question was in fact passed upon in considering the motion for rehearing; if not, the general rule applies."

The second purported federal question that the employees automatically severed their employment by allegedly striking in violation of the agreement was, as we have already stated, never raised below as a federal question.

In its main brief to the Court of Appeals, Petitioner as a defense to the motion to compel arbitration, attempted to develop the argument that:

> "No valid claims for Severance Indemnity, Notice of Dismissal Pay and Vacation Pay ever came

into existence, because the Union's members voluntarily severed their employment with the Company by going out on strike on January 28, 1955" (headnote to Point VI of Petitioner's brief).

As authority for this argument Petitioner cited several federal cases, all involving enforcement proceedings by the National Labor Relations Board.

Petitioner's position in this regard was untenable. The strike was in every respect lawful, and neither in law nor fact constituted a voluntary severance of employment, nor had Petitioner ever treated it as such. Indeed, in its brief to the Court of Appeals, Petitioner stated (at p. 14):

> "... as we have pointed out, it is not our position that the case turns on the question whether the calling of the strike on January 28, 1955, was a breach by the union of its contract."

It is, however, unnecessary to document either our contentions or Petitioner's on the point. The fact is that neither side was arguing a federal question. What was being argued was an affirmative claim that arbitration should be denied because the employees had terminated their employment before they became entitled to severance, dismissal and vacation pay. In the course of the argument some federal authority was cited by both sides to support their respective positions. We also relied on state authority and common law prior to the enactment of any state or federal labor statute.

The Court of Appeals held only that the defense was insufficient to preclude arbitration. It did not make this limited ruling by deciding a federal question. It simply pointed out that "whether or not the Guild called a strike in breach of the 'no strike' clause constitutes no defense to this motion to compel arbitration" (Appendix, p. 32).

Parenthetically the court stated: " . . . it has long been the rule that striking employees do not lose their status as employees" (Appendix, p. 32). It took pains, however, to clarify in the plainest language that it was not deciding whether either side was right or wrong about any substantive issue, but only whether there were questions for arbitration. "The question of performance," said the court, "goes to the merits and is a matter for the arbitrators whenever it appears that the parties have so consented" (Appendix, p. 31). On the record before it, the court was satisfied "that the motion to compel arbitration was properly granted." It was passing "on no other question" (Appendix, p. 32).

POINT II.

The record is devoid of evidence that the parties are subject to the Labor Management Relations Act, 1947.

A prerequisite to the existence of a federal question is a finding predicated upon allegations and proof that the parties are subject to the Labor Management Relations Act, 1947.

The record emphatically demonstrates the absence of any allegation, claim, effort to prove or finding that the parties are subject to the LMRA.

Assuming a critical jurisdictional fact not established by the record, Petitioner states:

> "It is not disputed that in the instant situation the Guild is a 'labor organization' representing employees in an industry affecting commerce and as such is subject to the provisions of the Labor-Management Relations Act, 1947." (Petition, p. 6.)

It then proceeds to extract from the record two stray items upon which it exclusively rests the assumption.

The first is a sentence in the collective bargaining agreement which states that: "The parties agree to abide by the (arbitration) award subject to such rules and regulations as any Federal agency having jurisdiction may impose."

Vague and indefinite on its face, this sentence manifestly expresses doubt as to whether the parties regarded themselves as subject to the jurisdiction of "any Federal agency." It represents nothing more than an undertaking that an arbitration award shall not conflict with the rules and regulations of some federal agency such as a war time wage stabilization board which *might* have jurisdiction under the national war powers of the federal government.

Moreover, even if the parties assumed that some federal agency had jurisdiction, the assumption is no proof of the fact, and it is certainly no proof that the parties are subject to the LMRA.

The second item relied upon by Petitioner as proof of the applicability of the LMRA is the opening paragraph of a letter received from Respondent dated September 1, 1954, which states (folios 37-38):

> "Pursuant to the provisions of the Labor-Management Relations Act, 1947, you are hereby notified that the Newspaper Guild of New York desires to modify the collective bargaining contract now in effect between The Brooklyn Eagle, Inc. and the Guild, which contract is dated November 30, 1952 and has a formal expiration date of November 29, 1954."

In writing this letter, Respondent of course was insuring itself against the possibility that section 8(d) of the Act (29 U. S. C. A. §158(d)) requiring 60 days notice of con-

tract termination, might at some future time be held applicable to it.

That Respondent did not concede the applicability of the LMRA is indisputable from the closing paragraph of the same letter, which reads (folios 38-39):

> "You are further advised that while this notice is given under the Labor Management Relations Act, 1947, the undersigned waives none of its rights and expressly reserves all objections to the constitutionality, validity and applicability of the Labor Management Relations Act, 1947, and of each and all provisions of said Act."

The only reference in the record to the LMRA is found in Respondent's letter of September 1, 1954. Consequently, the Appellate Division's observation that notice of contract modification was given "pursuant to the provisions of the Labor-Management Relations Act, 1947" (Petition, p. 6), is necessarily qualified by the letter's concluding paragraph. Small comfort can be gleaned by Petitioner from the observation.

Because the applicability of the LMRA has not been established, the Petition suffers from a basic jurisdictional infirmity and should therefore not be entertained.

POINT III.

The claim that federal courts have exclusive jurisdiction over proceedings to compel arbitration is without merit.

State and federal courts commonly share concurrent jurisdiction in civil actions where federal substantive law is controlling.

Typical instances where this occurs are personal injury suits by seamen under the Jones Act (46 U. S. C. A. §688),

O'Donnel v. *Great Lakes Dredge Dock Co.*, 318 U. S. 36 (1943); suits for unpaid minimum wages or overtime under the Fair Labor Standards Act (29 U. S. C. A. §201), *Emerson* v. *Mary Lincoln Candies*, 287 N. Y. 577 (1941); suits for penalty wages under the federal shipping law (46 U. S. C. A. §596); *Cox* v. *Lykes Bros.*, 237 N. Y. 376 (1924).

When Congress intends federal courts to have exclusive jurisdiction, it is usually explicit on the subject. Thus, in suits involving patents and copyrights, Congress provided (28 U. S. C. A. §1338), that the jurisdiction of federal district courts shall be "exclusive of the courts of the states."

Both the language and legislative history of Section 301 clearly establish that it was never the intention of Congress to vest exclusive jurisdiction in the federal courts over actions to compel arbitration.

The provision (quoted in full, Appendix, p. 13) is phrased in permissive rather than mandatory language. "Suits for violation of contracts," states Section 301, "may be brought in any district court." The key word, of course, is "may," which is far different than "must." "May" clearly envisions that the jurisdiction of district courts is not absolute or exclusive.

In reviewing the legislative history of Section 301, the majority opinion in *Textile Workers Union of America* v. *Lincoln Mills of Alabama*, 353 U. S. 448 (1957), noted that "a primary concern" of Congress was "that unions as well as employers should be bound to collective bargaining contracts" (p. 453). There was, however, a "broader concern," which was described as a "concern with a procedure for making such agreements enforceable in the courts by either party" (p. 453). This reference to "procedure" apparently was directed at the obstacles existing in the laws of many states to suits against labor unions as

unincorporated associations. Earlier in the opinion, this was described as the "procedural remedy lacking at common law," at p. 451.

The majority quoted from the Senate Report dealing with Section 301 to the effect that: "'We feel that the aggrieved party should also have a right of action in the Federal courts'" (S. Rep. No. 105, 80th Cong., 1st Sess., p. 15). This statement emphatically demonstrates that the jurisdiction Congress intended to confer on federal courts by Section 301 is an "also" or concurrent jurisdiction which does not destroy or supersede time-honored state jurisdiction in the same field.

Article 84 of Civil Practice Act of the State of New York was originally enacted in 1920. Since that time, and continuing to the present, New York courts have entertained motions to compel arbitration under collective agreements. We state without fear of contradiction that since the enactment of the LMRA, literally hundreds of proceedings to compel arbitration have been disposed of by the New York courts.

Petitioner's contention that the "fair implication" of this Court's decision in the *Lincoln Mills* trio of cases is that federal courts have exclusive jurisdiction over the enforcement of arbitration provisions in collective agreements affecting commerce is, in our view, unsupportable.

The precise issue before this court in all three cases was whether the federal courts were empowered under Section 301 to adjudicate suits for specific performance of arbitration provisions in collective bargaining agreements.

This court held that Section 301 vests authority in federal courts to hear such controversies, and that appropriate federal substantive law and remedies would have to be formulated to resolve them. We have no quarrel with this result; in fact, we welcome it.

However, to say that federal courts have jurisdiction over actions to compel arbitration is not to say that their jurisdiction is exclusive. We seriously doubt that Congress ever intended to oust state courts from their traditional juridical authority in this area.

As we have already shown, in numerous instances private litigants bring suits in state courts to enforce rights based on federal statutes, and the state courts, exercising concurrent jurisdiction, apply federal law.

That the decision of the New York Court of Appeals is consistent with federal substantive law is best demonstrated by *Goodall-Sanford Inc.* vs. *United Textile Workers of America*, 233 F. 2d 104 (C. A. 1 1956), aff'd 353 U. S. 550 (1957). In that case, Chief Judge Calvert Magruder, speaking for a unanimous court and citing with approval the instant case, directed arbitration.

Conclusion.

The petition for a writ of certiorari should be denied.

Dated: October 14, 1957.

Respectfully submitted,

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